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IN THE

# Supreme Court of the United States

October Term, 1961

No. 50

LOCAL 174, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
An unincorporated association,
*Petitioner,*

vs.

LUCAS FLOUR COMPANY, a Washington corporation,
*Respondent.*

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF WASHINGTON

## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

## JURISDICTION

**The judgment below is a final judgment of the highest court of the State of Washington.**

The judgment appealed from (R. 200) is certified as a judgment of the Supreme Court of the State of Washington. Even though the argument was to Department One of that court and the Opinion (R. 192-200) was signed by five judges only, the judgment certified is that of the Washington Supreme Court, not that of a department of that court. This should be a complete answer of Respondent's challenge to the jurisdiction of this Court.

However, even if we assume that the judgment was issued only by Department One composed of the Chief

Justice and four other judges, it is still a final judgment of the highest court of the State of Washington. Article IV, §2 of the Washington Constitution (Appendix A) provides that "the Supreme Court shall consist of five judges" but that the legislature may increase the number of judges and "may provide for separate departments of said court." Pursuant to this provision the legislature increased the number of judges to nine and authorized the court to sit in two departments, named departments one and two (R.C.W. 2.04.120; Appendix B). The Chief Justice sits in both departments (Rule 6, Appendix C). Each department is empowered "to hear and determine causes and all questions arising therein, subject to the provisions in relation to the court en banc." (R.C.W. 2.04.120) The Chief Justice together with any two associated judges, or any four associate judges are given discretion to order a cause to be heard en banc after a departmental decision (R.C.W. 2.04.150). An en banc hearing is granted as a matter of the court's discretion when the issues are considered sufficiently important to warrant it. No party has a right to an en banc hearing any more than he has a right to a rehearing of the appeal before the rendering department.

R.C.W. 2.04.160 provides that if no petition for rehearing or for an en banc hearing is filed "the decision of a department shall become final thirty days from the date of its filing," unless during such thirty days an en banc hearing is ordered on the court's own initiative. The judgment of the department becomes, in the absence of a rehearing, a final judgment of the Supreme Court of the State of Washington.

It is not uncommon for a state supreme court to sit in two sections or divisions. e.g. Code of Alabama Recompiled 1958, Title 13 §11; Calif Const art 6 §2; Colo Const art 6 §5; Fla Const art 5, §4; La Const art 7 §5, Mo Const of 1945 art 5§7 (but en banc if federal question is involved or if there is a dissent); NC Const art 4, §6 (but must be en banc if the constitutional question is involved); Tex Const art 5 §2. This is not too different from the very common state provision that a majority of a state supreme court shall constitute a quorum.[1]

The United States Supreme Court had occasion to discuss the Washington Supreme Court's present department arrangement in *Puget Sound Power & Light Co. v. King County*, 264 US 22, 68 L ed 541 (1924). There it was said (pp. 24-25):

> "Under the law of Washington a decision of a department of the supreme court does not become final

[1] Ark Const Amend 9 §1
Ariz Const art 6 §2
Del Const of 1792 art 6 §3
Ga Const of 1877 art 6 §2
Idaho Const art 5 §6
Ind Const art 7 §2
Ill Const of 1879 art 6 §2
Iowa Const art 5 §2
La Const art 7 §4
Md Const art 4 §14
Mich Const of 1850 art 6 §2
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NJ Const art 6 §1
N Mex Const art 6 sec 89
NY Const art 6 §5
ND Const sec 89
Okla Const art 7 §3
Penn Stats Ann Title 17 §10
Utah Const art 8 sec 2
Wisc Const art 7 §4
Wisc Const art 5 §5

until thirty days after it is filed, during which a petition for rehearing may be filed. If no hearing is asked for, or no order entered for a rehearing en banc, in thirty days the decision becomes final."

While the jurisdictional question presented by Respondent does not appear to have been passed upon by this Court heretofore, this Court has on numerous occasions taken jurisdiction of a judgment upon a writ of certiorari to the Washington Supreme Court where the opinion of that court was, as here, rendered by the court sitting in department and no petition for rehearing had been filed. The most recent of such cases are: *Hoy v. Rhay*, cert. granted, case transferred to appellate docket, 361 US 959, 4 L ed 2d 541, 80 S Ct 597 (1960); 54 Wn 2d 508, 342 P2d 607 (1959); *Ross v. Schneckloth*, judgment vacated and case remanded for reconsideration, 357 US 575, 2 L ed 2d 1547, 78 S Ct 1387 (1958), 51 Wn 2d 893, 318 P2d 975 (1957); *Arnold v. Nat'l Union of Marine Cooks and Stewards*, cert. granted 347 US 916, 98 L ed 1071, 74 S Ct 516; judgment affirmed 348 US 37, 99 L ed 46, 75 S Ct. 92; 44 Wn 2d 183, 256 P2d 1051; *U.S.A. v. Carroll Construction Co.*, cert granted, judgment vacated and case remanded for consideration, 346 US 802, 98 L ed 333, 74 S Ct 22; 41 Wn 2d 317, 249 P2d 234 (1952).

The judgment below represents a full and effective determination of the litigation from which there was no appeal to another state court. All matters presented to the court were passed on by the five-judge court without dissent, and there was nothing new to be argued in a petition for rehearing that had not already been fully argued in the briefs. As this Court stated in *Market Street R. Co. v.*

*Railroad Com. of Cal.*, 324 US 548, 551, 89 L ed 1171, 1177 (1945):

> "The judgment for our purposes is final when the issues are adjudged. Such finality is not deferred by the existence of a latent power in the rendering court to reopen and revise its judgment . . . Such latent powers of state courts over their judgments are too variable and indeterminate to serve as tests of our jurisdiction. Our test is a practical one."

The structure of the Supreme Court in the State of Washington is not to be confused with the entirely different procedure followed in the State of Missouri and described in the case of *Gorman v. Washington University*, 316 US 98, 86 L ed 1300 (1942), relied upon by Respondent. The Constitution of the State of Missouri provides that a litigant shall have an appeal from a divisional decision to an en banc court as a matter of right when a federal question is involved. Thus, under the Missouri Constitution, the division is not "the highest court of the state in which a decision could be had," inasmuch as a higher en banc hearing is provided as a matter of right for the purpose of passing on federal questions. *Gorman v. Washington University* is inapposite.

It is therefore submitted that this Court has jurisdiction of this action.

## MUTUAL AID AND PROTECTION

We are compelled to correct a misconception created by Respondent's Brief (Resp. Br. 11). Respondent tries to indicate that the trial court found that the picketing was in some manner not for the mutual aid and protection of

the union and its members. In Finding of Fact V (R. 187), the Court expressly found:

> "The picketing was for the purpose of compelling the plaintiff to rehire one of its employees, Mr. Welsch, a union member."

As discussed in our opening brief (Pet'r Br. 16-17), it is well established that a strike to force reinstatement of a discharged employee is concerted activity for mutual aid and protection. It would seem to be Respondent's position that such a strike is not for mutual aid and protection. Respondent did not make this argument to the court below, and the court below did not base its decision on any such theory. A reading of that opinion shows clearly that the strike was to force Welsch's reinstatement and that was the totality of the facts in this respect (R. 195). This case presents no factual disputes, all such matters having been clearly determined—for the most part by stipulation.

Respectfully submitted,

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## APPENDIX A

### Constitution of the State of Washington

ARTICLE IV—The Judiciary

§2 SUPREME COURT. The supreme court shall consist of five judges, a majority of whom shall be necessary to form a quorum, and pronounce a decision. The said court shall always be open for the transaction of business except on non-judicial days. In the determination of causes all decisions of the court shall be given in writing and the grounds of the decision shall be stated. The legislature may increase the number of judges of the supreme court from time to time and may provide for separate departments of said court.

## APPENDIX B

### Statutes of the State of Washington

Revised Code of Washington

R.C.W. 2.04.120 Two departments—Quorum

There shall be two departments of the superme court, denominated respectively department one and department two. The chief justice shall assign four of the associate judges to each department and such assignment may be changed by him from time to time; *Provided,* That the associate judges shall be competent to sit in either department and may interchange with one another by agreement among themselves, or if no such agreement be made, as ordered by the chief justice. The chief justice may sit in

either department and shall preside when so sitting, but the judges assigned to each department shall select one of their number as presiding judge. Each of the departments shall have the power to hear and determine causes, and all questions arising therein, subject to the provisions in relation to the court en banc. The presence of three judges shall be necessary to transact any business in either of the departments, except such as may be done at chambers, but one or more of the judges may from time to time adjourn to the same effect as if all were present, and a concurrence of three judges shall be necessary to pronounce a decision in each department: *Provided*, That if three do not concur, the cause shall be reheard in the same department or transmitted to the other department, or to the court en banc.

R.C.W. 2.04.150 Apportionment of business – En banc hearings

The chief justice shall from time to time apportion the business to the departments, and may, in his discretion, before a decision is pronounced, order any cause pending before the court to be heard and determined by the court en banc. When a cause has been allotted to one of the departments and a decision pronounced therein, the chief justice, together with any two associate judges, may order such cause to be heard and decided by the court en banc. Any four judges may, either before or after decision by a department, order a cause to be heard en banc.

R.C.W. 2.04.160 Finality of departmental decision–Rehearings

The decision of a department, except in cases otherwise

ordered as hereinafter provided, shall not become final until thirty days after the filing thereof, during which period a petition for rehearing, or for a hearing en banc, may be filed, the filing of either of which, except as hereinafter otherwise provided, shall have the effect of suspending such decision until the same shall have been disposed of. If no such petition be filed the decision of a department shall become final thirty days from the date of its filing, unless during such thirty-day period an order for a hearing en banc shall have been made . . . The effect of granting a petition for a rehearing, or of ordering a cause once decided by department to be heard en banc, shall be to vacate and set aside the decision. Whenever a decision shall become final, as herein provided, a judgment shall issue thereon.

R.C.W. 2.04.170 En banc hearings—Quorum—Finality of decision

The chief justice, or any four judges, may convene the court en banc at any time, and the chief justice shall be the presiding judge of the court when so convened. The presence of five judges shall be necessary to transact any business, and a concurrence of five judges present at the argument shall be necessary to pronounce a decision in the court en banc: *Provided*, That if five of the judges so present do not concur in a decision, then reargument shall be ordered and all the judges qualified to sit in the cause shall hear the argument, but to render a decision a concurrence of five judges shall be necessary; and every decision of the court en banc shall be final except in cases in which no previous decision has been rendered in one of the departments, and in such cases the decision of the court en banc

shall become final thirty days after its filing, unless during such period a petition for rehearing be filed. The filing of such petition within such period shall have the effect of suspending the decision until disposed of by the concurrence of five judges . . .

## APPENDIX C

### Rules Peculiar to the Business of the Supreme Court

RULE 6 Two Departments—Assignment of Judges

The court is divided into two departments, denominated respectively, Department One and Department Two. The Chief Justice shall assign four of the associate judges to each department, and such assignment may be changed by him from time to time, provided that the associate judges shall be competent to sit in either department and may interchange with one another by agreement among themselves, or, if no such agreement is made, as ordered by the Chief Justice.

The Chief Justice shall sit in both departments and shall preside when so sitting.

Each of the departments shall have the power to hear and determine causes and all questions arising therein, subject to the provisions in relation to the court *en banc*.

The presence of four judges shall be necessary to transact any business in either of the departments, except such as may be done at chambers, but one or more of the judges may from time to time adjourn to the same effect as if all were present, and a concurrence of four judges shall be

necessary to pronounce a decision in each department.

RULE 7 Apportionment of Business—Order for hearings en banc

The Chief Justice shall from time to time apportion the business to the departments, and may, in his discretion, before a decision is filed in the office of the clerk, order any cause pending before the court to be heard and determined by the court *en banc*.

Any four judges, at any time before the filing of a decision in the office of the clerk by a department, may order a cause to be heard *en banc*.

RULE 15 Hearings en banc—Quorum—Finality of decision

The Chief Justice, or any four judges, may convene the court *en banc* at any time, and the Chief Justice shall be the presiding judge of the court when so convened. The presence of five judges shall be necessary to transact any business, and a concurrence of five judges present at the argument shall be necessary to pronounce a decision of the court *en banc*: *Provided*, That if five of the judges so present do not concur in a decision, then reargument shall be ordered and all the judges qualified to sit in the cause shall hear the argument, but to render a decision a concurrence of five judges shall be necessary; and every decision of the court whether rendered *en banc* or by a department shall be final thirty days after its filing, unless during such period a petition for rehearing be filed. The filing of such petition within such period shall have the

effect of suspending the decision until disposed of by the concurrence of five judges: *Provided*, That if for any cause five judges shall be of the opinion that such decision should go into effect prior to thirty days after its filing, it shall go into effect any time after its filing and prior to such thirty-day period upon being in writing approved by six judges of such court. Whenever a decision shall become final as herein provided, a judgment shall issue thereon. *Provided*, That where a decision goes into effect in less than thirty days from the date of its filing, the judgment shall not be final as to the amount of the costs of the action taxed and allowed. The costs on appeal shall be computed and taxed as provided in Rules on Appeal 55. The costs as thus finally taxed will then be included in a supplemental judgment.

## Rules on Appeal

RULE 50 Petitions for rehearing

Any party to an appealed case may, after an opinion has been filed, present to the court, in the manner and time as hereinafter provided, a petition for rehearing.

Every petition for rehearing shall be filed within thirty days after the opinion in the cause has been filed. No more than one petition shall be filed by the same party. The filing of a petition for rehearing shall suspend the decision of the court until the cause is finally determined.

When a rehearing is granted, the clerk shall notify counsel for the respective parties thereof.

When an answer to a petition for rehearing is called for by the court, the clerk shall mail to the attorney of the party from whom the answer is required a copy of the original petition, with a request that he file an answer thereto within fifteen days and serve a copy thereof on opposing counsel.

Three copies each of the petition for rehearing and of the answer thereto, if called for, shall be filed with the clerk.

Petitions for rehearing and answers thereto may be printed, mimeographed, or typewritten. If a petition for rehearing be granted, the court may require additional copies of the petition, answer and briefs to be supplied in the manner indicated by the court.